FILED
AUG 20 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

No. 331

HERBERT S. MILLER, for the benefit of himself and all persons similarly situated,

Petitioners,

vs.

J. J. GILLIECE and W. K. WELLS, personally and as representatives of all members of the BROTHERHOOD OF RAILROAD TRAINMEN, and THE PENNSYLVANIA RAILROAD,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1956

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on June 4, 1956.

Citations to Opinions Below.

Neither the opinion of the District Court, printed as Appendix A hereto (*infra*, p. 1a) nor the opinion of the Court of Appeals, printed as Appendix B hereto (*infra*, p. 5a), are reported.

Jurisdiction.

This petition for a Writ of Certiorari was filed on the 20th day of August, 1956, less than 90 days after June 4, 1956, the date of entry of the judgment below. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented.

1. Is the decision of a System Board of Adjustment, established under Section 3, Second, of the Railway Labor Act, subject to judicial review, where such Board is comprised of an equal number of representatives from the carrier-employer and from the labor organization or union charging and prosecuting the cited employees with non-compliance of the Union Shop Agreement, and where the employees' jobs and seniority rights depend on whether such Board finds a rival labor organization of which the cited employees are members to be "national in scope"?

2. Does Section 3, First (f), which provides an administrative procedure for a Railroad labor organization to be determined to be national in scope for the purpose of securing representation on the National Railroad Adjustment Board provide an adequate remedy to an employee and member of a rival labor organization for lack of due process where the same interested labor organization acts as accuser, prosecutor, judge and jury in determining whether an employee has complied with the Union Shop Agreement?

Statutes Involved.

Pertinent provisions of the Railway Labor Act, 45 U. S. C. Secs. 152, 153 are set forth in Appendix C to this petition, p. 6a, *infra*.

Statement of the Case.

On January 12, 1955, petitioners filed a petition in the Court of Common Pleas, Hamilton County, Ohio, against the respondent, Pennsylvania Railroad Company, and the respondents, J. J. Gilliece and W. K. Wells, personally and as representatives of all members of the Brotherhood of Railroad Trainmen (hereinafter referred to as the BRT).

It alleged that the petitioners had been employed for more than 5 years as operating employees of the Pennsylvania Railroad (R. 2a). On March 22, 1952, the Pennsylvania and its employees represented by the BRT entered into a Union Shop Agreement, as permitted by Section 2 Eleventh of the Railway Labor Act (R. 14a). The agreement provided that the requirement of Brotherhood membership was not applicable to employees "who maintain membership in any one of the other labor organizations, national in scope, organized in accordance with the Railway Labor Act" (R. 16a).

The petition sets forth that the plaintiffs in 1952 and 1953 allowed their membership in the BRT to lapse and as a result were cited by the defendant BRT before the Pennsylvania Railroad for non-compliance with the Union Shop Agreement. The petition states that the defendant BRT has refused to reinstate petitioners; has denied petitioners' membership in the BRT after petitioners applied for membership reinstatement; and that the defendant BRT forced the Pennsylvania Railroad to discharge petitioners contrary to the Railway Labor Act, Sec. 2, Eleventh (a) (R. 4a, 5a).

Prior to their membership withdrawal from the BRT, the petitioners became members of United Railroad Operating Crafts (hereinafter referred to as UROC), a volun-

tary labor organization, and they continued their membership in said UROC to the present day (R. 14a). Petitioners requested and were given a hearing before the System Board of Adjustment constituted pursuant to the terms of the Union Shop Agreement (R. 14a). The Board was composed of two members appointed by and representing the carrier and two members appointed by and representing the BRT (R. 19a), the same organization which had instituted and prosecuted the charge of noncompliance against the petitioners. The System Board of Adjustment, so constituted, found that the cited employees' membership in UROC did not constitute compliance with the Union Shop Agreement (R. 14a, 15a).

On the basis of the foregoing allegations, the petition asked the Court to restrain BRT and Pennsylvania from discharging or suspending the petitioners until they had been given an opportunity for reinstatement into membership in the Brotherhood under the same terms or conditions available to other members (R. 6a). It was alleged that their discharge, following the Brotherhood's refusal to reinstate them, was contrary to Sec. 2, Eleventh (a) of the Railway Labor Act (R. 6a).

Thereafter the defendant, BRT, obtained the removal of this action from the Court of Common Pleas, Hamilton County, Ohio, to the United States District Court, Southern District of Ohio, Western Division (R. 9a).

The BRT filed a motion to dismiss the action in the District Court (R. 12a) for the reason that it appears on the face of the petition that it presents a nonjusticiable controversy and the Court has not jurisdiction of the subject of the action.

The Pennsylvania filed a motion to dismiss the action in the District Court on the ground that the peti-

tion fails to state a claim upon which relief can be granted (R. 12a).

The parties to this action filed a stipulation including the above facts with exhibits which were accepted by the District Court as a basis for its conclusions of law (R. 14a-15a).

The District Court sustained defendants' motion to dismiss, ruling that the complaint failed to state a claim upon which relief could be granted, and that the Court had no jurisdiction to hear the matter (R. 25).

The Court of Appeals for the Sixth Circuit on August 5, 1955, restored the temporary restraining order which had been dissolved by the Court below, pending appeal to that Court. On June 4, 1956, the Court of Appeals affirmed the decision in the lower court of lack of jurisdiction upon the authority of *Pigott vs. Detroit, Toledo & Ironton Railroad Co.*, 221 F. 2d 736 (C.A. 6, cert. den. 350 U. S. 833). On June 29, 1956, the Court of Appeals denied a petition for rehearing.

Reason for Granting the Writ.

1. The decision of the Court of Appeals for the Sixth Circuit in this case is in apparent direct conflict with the decision of the Court of Appeals for the Second Circuit in *Pennsylvania Railroad Co. and Brotherhood of Railroad Trainmen vs. Rychlik*, 229 F. 2d 171, certiorari granted—U. S. (Advance P. 644). This case, the *Rychlik* case, *supra*, and *Pigott vs. Detroit, Toledo & Ironton R. Co.*, 221 F. 2d 736, cert. den. 350 U. S. 833, also decided by the Sixth Circuit by a divided Court arose from a common set of facts.

Judge Learned Hand, in writing the unanimous opinion in the *Rychlik* case, *supra*, stated that the *Pigott* decision

> "is flatly in favor of the defendants at bar, and if the appeal is to succeed we must interpret the Act differently or declare it unconstitutional."

Judge Hand then construed the Act contrary to the interpretation adopted by the Court of Appeals for the Sixth Circuit.

The fundamental question in these cases is whether the decision of the System Board of Adjustment as constituted is reviewable by a Court because of the obvious bias of the members of the System Board. This in turn involves the question of whether Section 3, First (f) is an adequate remedy to protect against the bias of the System Board of Adjustment in determining whether a rival union is "national in scope."

The Second Circuit in the *Rychlik* case, *supra,* held that because of the obvious bias of the System Board of Adjustment

> "nothing could more completely defeat the most elementary requirements of fair play; and nothing would more firmly entrench the recognized union in power;"

than to deny the employee the right of impartial review. The Court further held that Section 153, First (f) was not an adequate remedy to protect against this apparent bias. Thus the Court said that a Board of three, selected in accordance with Section 3, First (f) might leave undecided the question whether the applicant union was "national in scope" and hence would not necessarily provide the essential impartial determination. In addition, the union claiming to be "national in scope" might not desire to be an elector for purposes of the National Railroad Adjustment Board; the employee would thus forfeit his rights to have an impartial tribunal decide whether he should hold his job. Therefore, the Court construed the Act as granting the

employee the basic and constitutional privilege of having his rights determined by an impartial judicial tribunal rather than being dependent upon the uncertain possibility that his union would, by itself, assert such rights. Finally, the Court said that the employee has no means of compelling his own and competing union to apply to be an elector; and even if the employee had such means, the Court could see no justification for forcing the employee to accept the union as a surrogate on his behalf.

The Sixth Circuit in the *Pigott* case, *supra,* conceded that a hearing before the System Board was not a fair one. The Court held, however, that the procedure outlined in Section 3, First (f)

> "insures a fair determination, by a three-member Board, of the question as to the right of a labor organization to participate in the selection of the labor members of the National Railroad Adjustment Board" (221 F. 2d p. 740).

The Court further held that there was no denial of due process because of the make-up of the System Board. This conclusion was based on reading Section 153, First (f) as providing a means for a fair determination as to whether a labor organization is "national in scope," even though the administrative machinery for such determination must be used in a proceeding under the Act merely to qualify for the right to select members of the National Railroad Adjustment Board, and even though this administrative procedure is not available to the employees themselves, but only to labor organizations. In other words, the Court held that before a union can qualify as "national in scope" so that its members came within the exception to the Union Shop requirement it must also participate in the Adjustment Board machinery to obtain a seat on that Board and thereupon be recognized as an organization "national in scope."

The present case, since its holding is based on the *Pigott* case, is thus in direct conflict with the *Rychlik* case, *supra*. This conflict between the decision below and that of the *Rychlik* case, *supra*, warrants the granting of a Writ of Certiorari to review and resolve the differing statutory interpretations.

In *Slocum vs. Delaware, L. & W. R. Co.*, 339 U. S. 239, this Court held that exclusive *primary* jurisdiction for the settlement of labor disputes in the Railway Industry was in Boards established under the structure set up in the Railway Labor Act. In Footnote 7, page 244 of the opinion, this Court made it clear that its decision did not cover cases dealing with a conflict in interest between an employer and his bargaining representative, or a case involving judicial review of Board action or inaction. Thus Justice Reed, in his dissenting opinion stated:

> "The Court, however, in note 7 states that it is not 'called upon to decide any question concerning judicial proceedings to review Board action or inaction.' From this I take it that the Court means only to hold that the Board has what might be called exclusive primary jurisdiction and that the decision is to have no implication for later cases which might pose the issue of judicial review of Board action or inaction" (p. 245).

The present case is within both of the excepted categories, and presents the very problem which Justice Reed foresaw the Court would be faced with in the future (p. 254 dissenting opinion). These questions have never been disposed of by the Court, and this case together with the *Rychlik* case, *supra*, in which the Court has already granted the petition for a Writ of Certiorari, deals specifically with these points.

Until the decision by the Sixth Circuit in the *Pigott* case, there was substantial uniformity among the various Fed-

eral Circuit Courts that there was at least a limited right of review from decisions rendered by a System Board of Adjustment.

In *Edwards vs. Capital Airlines,* 176 F. 2d 755, cert. den. 338 U. S. 885, the Court of Appeals for the District of Columbia held in a substantially similar case that there was a right to a full review on the merits of the System Board decision.

Both the Court of Appeals for the Third Circuit in *Bower vs. Eastern Airlines,* 214 F. 2d 623 and the District Court of Washington in *Farris vs. Alaska Airlines, Inc.,* 113 F. Supp. 907, held that there was a limited review from decisions of the System Board of Adjustment to determine whether the Board had given the employee a full and impartial hearing.

In *Johns vs. Baltimore and Ohio R. Co.,* 118 F. Supp. 317, another case dealing with employees of UROC, a three-judge Court said the dispute was

> "* * * cognizable by the Board, and that should put an end to the jurisdiction of this Court *until plaintiff has there sought his remedy.*" (Italics supplied.)

Since this case and the *Pigott* case, *supra,* are exceptions to the prevailing judicial thinking on the question of review of System Board action, review by this Court is necessary.

3. The decision of this case is not in accord with previous decisions rendered by this Court.

If the interpretation placed on Section 153, First (f) by the Sixth Circuit is correct, then this Section must be the *sole* way in which "national in scope" status may be determined. But this Court has already indicated that the determination of the three-man Board under Section

153, First (f) is *not* the sole way in which national in scope status may be obtained. In *Order of Railway Conductors vs. Swan,* 329 U. S. 520, 522-523, this Court characterized the Railroad Yardmasters of America as a "national labor organization" although that organization failed to place any representatives on any one of the four divisions of the National Railroad Adjustment Board. In that case this Court referred to the Order of Railway Conductors and the Brotherhood of Railroad Trainmen, both of which organizations have representatives on the National Railroad Adjustment Board, as "national labor organizations." The Court then stated

> "but that contention is contradicted by the Railroad Yardmasters of America, a national labor organization composed almost entirely of yardmasters claiming to represent more than 70 per cent of all the yardmasters in the country. That organization, * * * has failed to place a representative on any of the four divisions" (p. 523).

This Court has recently held in *NLRB vs. Highland Park Mfg. Co.,* 341 U. S. 322, that a Federal Court is empowered to determine whether a labor organization is a "national or international organization." The National Labor Relations Board, which did not have representatives of the labor organization in question sitting on its panel, had held that such organization was subject to the statutory phrase. This Court affirmed a Federal Court decision which determined otherwise. As Judge Allen stated in the dissenting opinion in the *Pigott* case, *supra*:

> "It is equally appropriate for a Federal Court to determine whether a labor organization is 'national in scope.' The *expertise* demanded in one case is no greater than the other. If Congress intended the geographic adjectives to have other

than their ordinary civil meaning it would have given them a special meaning by definition" (p. 743).

Conclusion.

For the foregoing reasons, the petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be granted. This Court has already granted the petition for Writ of Certiorari in the *Rychlik* case, *supra,* and petitioners respectfully submit that the issues of this case should be heard and decided as a companion case.

Respectfully submitted,

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